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No. 87-438

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARA FRATICELLI, ET AL., PETITIONERS

v.

DOW CHEMICAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In addition to raising several issues that only indirectly bear on the potential liability of the United States,[1] petitioners contend (Pet. i, Question III) that the court of appeals erred in holding that their claims against the federal government are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. William Fraticelli, James Oshita, and Masao Takatsuki were civilians employed by the University of Hawaii. They contend that in 1966 and 1967 they were exposed to the herbicide "Agent Orange," which was used as a defoliant in Vietnam, while it was being tested by the University's Experimental Station for Tropical Agriculture pursuant to a contract with the Defense Department.

[1] The claims of petitioners Fraticelli, Oshita, and Takatsuki against the defendants other than the federal government were dismissed as time-barred, and petitioners' arguments (Pet. 9-18) challenging that action are not addressed here. Likewise, we do not discuss the contention of petitioner Hogan that his complaint (which did not name the United States as a defendant) was improperly dismissed under Fed. R. Civ. P. 37 as a sanction for refusing to continue his deposition. The United States did not participate in the litigation of either of these issues in the courts below.

Fraticelli died of cancer in 1981 and Oshita and Takatsuki have been treated for cancer, allegedly resulting from their exposure to Agent Orange. Pet. App. 622a-623a.[2] Petitioners complained that the United States failed to warn its contractor of the dangers of Agent Orange and to instruct it concerning how it should be handled. C.A. App. 483-484.

In granting summary judgment for all defendants, the district court concluded, inter alia, that "there is no admissible evidence that Agent Orange caused plaintiffs' illnesses" and entered summary judgment in favor of the defendants (Pet. App. 629a). It noted that the record showed that Fraticelli, Oshita, and Takatsuki all regularly smoked cigarettes and drank alcohol (*id.* at 623a),[3] and that "[i]n none of the extensive records of treating physicians and hospitals supplied by plaintiffs' counsel could the court find any reference to Agent Orange" (*id.* at 624a).

The court of appeals affirmed the dismissal of petitioners' claims against the United States on the basis of the discretionary function exception,[4] although that issue had not been addressed by the district court.[5] The court stated:

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[2] The petitioners in Nos. 87-436, 87-437, and 87-438 filed a single appendix.

[3] According to the district court, Fraticelli, who died of lung and kidney cancer, "smoked over one pack of cigarettes per day" and drank "2 to 3 shots of whiskey per day for many years" (Pet. App. 623a); Oshita, who was treated for bladder cancer, in addition to other ailments, smoked one to one-and-one-half packs of cigarettes per day, regularly consumed alcohol at least until 1971, and had a family history of cancer (*ibid.*); Takatsuki, who was treated for mouth cancer, "has a 60-80 pack per year history of smoking and also a moderate alcohol intake" (*ibid.*).

[4] The court also noted that "it appears to be conceded that Mrs. Fraticelli did not file a claim for her husband's death" as required by 28 U.S.C. 2401(b), and that her claim is barred for that reason as well (Pet. App. 773a). Petitioners do not challenge that conclusion.

[5] Contrary to petitioners' claim (Pet. 7) that the court of appeals "unilaterally undertook to dismiss the petitioners' claims * * * on the

"It cannot be seriously contended that the decision to use Agent Orange as a defoliant was anything but a discretionary act. In pursuance of this decision, the Government entered into a contract with the University of Hawaii to perform field tests with the herbicide. Plaintiffs, who claim to have been injured during the course of those field tests, cannot remove them from the category of discretionary functions by vague and irrelevant allegations of negligent labeling, shipping, handling, etc." Pet. App. 774a.

2. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

As the court of appeals concluded, the decision to use Agent Orange in Vietnam was plainly a policy decision of the sort covered by the discretionary function exception. See *Dalehite* v. *United States*, 346 U.S. 15, 37 (1953). And, as the court of appeals concluded in one of the companion Agent Orange cases (*Aguiar* v. *United States*, 818 F.2d 194, 200 (2d Cir. 1987)), numerous courts have held that the exception bars claims alleging failure to warn where the exercise of discretion was involved. *Ford* v. *American Motors Corp.*, 770 F.2d 465, 467 (5th Cir. 1985); *Cisco* v. *United States*, 768 F.2d 788, 789 (7th Cir. 1985); *Begay* v. *United States*, 768 F.2d 1059, 1066 (9th Cir. 1985); *Shuman* v. *United States*, 765 F.2d 283, 291 (1st Cir. 1985); *General Public Utilities Corp.* v. *United States*, 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985); *Green* v. *United States*, 629 F.2d 581, 585-586 (9th Cir. 1980). Accordingly, the court of appeals correctly concluded that the decisions petitioners challenge, which relate to the testing of a chemical intended for use in combat, are decisions "of the nature and quality that Congress intended

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basis of the 'discretionary function' exception," however, the government had raised the argument in oral and written submissions to the district court and in the government's brief on appeal.

to shield from tort liability" by the discretionary function exception. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 813 (1984). Moreover, as the court of appeals stated in a companion Agent Orange case (*Aguiar,* 818 F.2d at 201), the "paucity of proof concerning the possible deleterious effects of Agent Orange made the decision" concerning warnings or instructions "even more clearly an exercise of discretion."

Relying on *Dalehite,* petitioners contend that the court of appeals erred because, in their view, "[t]he failure to instruct, warn, or properly package a highly toxic substance is clearly not 'a policy judgment or decision' within the meaning of § 2680(a)" (Pet. 22). However, contrary to petitioners, analysis of this Court's decision in *Dalehite* leads to the opposite conclusion. The Court there concluded that decisions relating to the bagging and labeling of explosive fertilizer were protected by the discretionary function exception since they had been made "under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department" (346 U.S. at 40). Here, as the court of appeals noted in a companion case, "[t]he ultimate policy decision to use Agent Orange was made by President Kennedy" (*Aguiar,* 818 F.2d at 198). It is therefore plain that decisions relating to how to test Agent Orange for use in Vietnam were clearly made pursuant to a plan developed at a high level of the Executive Department and, under *Dalehite,* cannot form the basis of a tort suit against the government.

Moreover, this case presents a stronger basis than *Dalehite* for invocation of the discretionary function exception because it involves military decisions directly affecting combat. Agent Orange was used "to defoliate areas in order to reduce the military advantage afforded enemy forces by the jungle and to destroy enemy food supplies."

In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 148 (2d Cir. 1987). This Court has repeatedly held that courts should not "second-guess military decisions." *United States* v. *Shearer*, 473 U.S. 52, 57 (1983); see also *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977). Rather, military decisions are by and large subject to the control of the Legislative and Executive Branches, not the courts. See *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Gilligan* v. *Morgan*, 413 U.S. 1, 10-11 (1973); *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). Accordingly, it is particularly appropriate that decisions relating to the testing of chemicals used in fighting a foreign war should be immune from questioning by means of tort suits under the discretionary function exception.[6]

Petitioners assert that review is warranted because the courts of appeals are divided on how to apply the discretionary function exception following this Court's decision in *Varig Airlines*. However, petitioners do not explain how the courts of appeals are in disagreement, but instead merely cite in a footnote (Pet. 19-20 n.6) some cases where courts have concluded that suit is barred by the exception and other cases where courts have ruled that suit is not barred. Of course, the discretionary function exception does not bar all tort claims against the government, and this Court noted in *Varig Airlines* that it is not possible "to define with precision every contour of the discretionary function exception" (467 U.S. at 813). But decisions

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[6] In addition to *Dalehite*, petitioners primarily rely (Pet. 22) on this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). That case is clearly inapposite. The alleged negligence there—not keeping a lighthouse operational—is simply not comparable to decisions relating to how to conduct a war. Moreover, the government did not allege that the discretionary function exception barred the suit (*id.* at 64), so the exception was not at issue in *Indian Towing*.

relating to the implementation of a program to test and use chemicals in a foreign war are within the scope of the exception, and petitioners cite no case where a court has permitted a comparable claim to go forward.[7] Accordingly, there is no warrant for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied insofar as petitioners seek review of the dismissal of their claims against the United States.

DONALD B. AYER
*Acting Solicitor General**

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[7] Petitioners cite four cases where courts of appeals have held that suit was not barred by the discretionary function exception. None of those cases called into question any policy judgments relating to the conduct of a war. *Aslakson* v. *United States*, 790 F.2d 688, 693 (8th Cir. 1986) (failure to raise a power line over a lake); *Henderson* v. *United States*, 784 F.2d 942, 943 (9th Cir. 1986) (injury caused by contact with an exposed live electrical wire in a remote area of a military base); *Collins* v. *United States*, 783 F.2d 1225, 1230 (5th Cir. 1986) (failure to close a salt mine despite high readings of methane gas); *Alabama Electric Cooperative, Inc.* v. *United States*, 769 F.2d 1523, 1525 (11th Cir. 1985) (erosion caused by placement of dikes and jetties).

*The Solicitor General is disqualified in this case.

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